





Gould

(74)

Wagering contracts by common law are in general valid. And it is not essential to such a contract that it be in itself contingent. It is sufficient if it is equally contingent or uncertain to both parties. Cowh 37, 2 T.R. 610. 3 T.R. 693, ^{and to invalidate the case of ignorance and error ante} Dec 2^d & 44.

Erroneous representations invalidate ~~invalidate~~ a contract in some cases and in others not. The rule is that if the circumstance misrepresented is the principal cause or inducement to the contract it is void but if it is not the principal inducement the contract is not void but the person misrepresenting is liable in damages according to the difference in value 1 Pow 147, 9, 2 Pow 196, 2 L'1, 1 Ves 401, 1 Horn 32, 2 Horn 145.

But if the erroneous representations are fraudulent it always vitiates the contract.

If certain things are made necessary by the contract then erroneous representations concerning those things will invalidate the contract 1 Pow 150. The fact of assent to a contract may be inferred from circumstances some authorities

Mr Powell says, if an unsound article is sold for a sound price which it could not have been worth if it was not sound then want of consent assent may be implied 1 Pow 150, Judge says this rule is incorrect see Cowh 113, Lang 23, 1 T.R. 133, 3 T.R. 757, Peck Cas 115, 123, 1 Pow 142, 2 East 314

It has indeed been determined in this state that if a thing is sold for a sound price when it was unsound damages might be recovered but has lately been contradicted by one or two decisions how it is settled I do not know see 2 Root 417, 2 Swift 124, 160.

We now proceed to consider the subject of a contract ^{of what subjects contracts may be made} ^{on this subject} ^{there is a diversity in the law arising from contracts} ^{being executed or executory}

By an executed contract is meant one which is finished and nothing further to be done

An executory contract is one to be performed in future. By a contract executed a person cannot transfer any thing in which he has not an actual or potential interest at the time of the contract. *How* 432, *1 Pow* 152, *Went* 132, *1 Inst* 307.

For one in grant that to which he has an in-whole title only, it is descendable, devisable and in equity assignable. *45 R.R.* 48, *1 Pow* 135, *Fern.* 44154, *1 Fomb* 295, *3 J.R.* 48, *1 H. Bl.* 3,

When there is an actual agreement ~~to deliver~~ although the property is not delivered it is an executed contract. *How* 432, *1 Pow* 154-5,

But if a person has a potential interest in a thing he may transfer it and the contract will be binding if potential interest is when he owns the thing from which the thing contracted for is to arrive. *Went* 132, *Pow* 156-7,

But by a contract executory a person may bind himself to convey what he does not now possess and if he fails to perform damages may be recovered although a court of equity would not decree a specific performance if it was impossible for him to perform it. *1 Pow* 158-7,

But if a contract is completed so that no further act is necessary it is an executed contract and there must have been an actual or potential interest to pass by the contract or it is void. *2 Bl. Com.* 443, *1 Pow* 159, *234*,

But if the contract is so framed as to operate ^{if afterwards happens} ~~as an estoppel~~ it will bind him not on the ground of contract executed but because he is estopped from saying he had no interest at the time of the contract by his covenant of sesin. *2 Bl.* 295. *1 Root* 222, that this rule holds as to leases see *Salk* 276, *Litt. Ray* 279, *104 R.* 1550, *3 J.R.* 370, *Pow.* *North* 295-6 as to mortgages see *Pow.* *North* 97, *2 Vern* 11, *1 J.R.* 760 as to Freehold estates *1 Pow* 160, *3 J.R.* 370, *Litt. m.* 440, *1 Inst* 265, *2 Bl.* 295,

There are three requisites to a good contract - 1st That

it be Possible 2^d Lawful. 3^d Certain The first
 requisite is that it be possible of performance
 No right is acquired or lost by a contract that is
 naturally impossible of performance 1 Pow 166,
 174, 1 Roll 420, 1 Inst 206, Perkins sec 795,
 We are treating of impossible stipulations and
 not of impossible conditions.

We must distinguish between things in themselves
 impossible and those impossible on account of
 the inability of the person performing. Those of
 the latter kind are binding L^d Ray 1105, 1 Pow
 161-2

There is a plain difference between them. in the
 first case it was in the knowledge of both the
 parties contracting that it was impossible at the
 time and in the other not.

There are two cases in the books which appear to me
 to be decided right though for quite different
 reasons ~~from~~ those given by the court and indeed
 I think the decisions are not supported by the reasons
 there given One case is where a man bought a
 horse and agreed to give a farthing for the first
 nail four for the second Dec. 2 L^d Ray 1164
 6 Mod 305. 1 Vent 269, 1 Lev 111, 1 Wils 295,
 Judge thinks that the express contract was void
 on the ground of fraud and if so the law
 raises an implied contract from the res
 gestae to pay the value of the thing received
 that the value of the article is the rule of damages
 see 1 Pow 408, 2 Burr 1010, 2 East 211, 1 Barn 217,
 The remoteness or remoteness of the probability is not
 regarded in executory contracts but in executed
 it is Pow 163-4,
 And if one party covenants ^{absolutely} to perform an act
 not naturally impossible his being prevented
 from performing it by inevitable accident is
 no excuse and does not avoid the contract
 3 Burr 1639, 1 Fomb 366, Doug 259, but if im-
 possible in the nature of things the contract is void

(95) Contracts should be lawful i.e. the thing stipulated to be done must be lawful 1 Bos 164-5, Unlawful Contracts are either malum prohibitum or malum in se, Contracts are malum in se when they are contrary to the natural or moral Law, 1 Hawk, 183, 1 Fort 213, Com 37.

Contracts are unlawful when they are contrary to the Law of the Land and this they may be in several ways 1st When they militate against the public welfare 2nd When they are opposed to some rule of the Law 3rd When they are opposed to some statute. 1 Bos 166, Com 37, 2 Wils 341, 3 IR 17, 22-3, 7 IR 5-3, 8 IR 89, 1 Bos Bull 272. All contracts in restriction of trade are unlawful and void as if one should contract not to follow any trade or not to follow a particular trade Hobart 211, May 292, Cro Eliz 4, 7 IR 1 Bos 166-7, And the rule is general that all contracts which militate against the public welfare are in general void. 1 W. Bl 322-7, 7 IR 543, 8 IR 89, That a Contract not to follow a particular trade is void see 11 Coke 53^d 7 IR 543, Cro Jac 596, 1 S. M. 181,

But an agreement not to exercise a particular trade in a particular place may be good for it may be for the public benefit Cro Jac, 596, 2 Bult 136 Palmer 176. But such an agreement must be on a sufficient consideration and the onus probandi as to the consideration falls on the person claiming under the contract Stra 739, Palm 172, 1 S. M. 181, 172, 10 Mod 27, 85, 130, immaterial where a person agrees generally not to pursue a trade whether he is of that particular trade himself or not 1 S. M. 192, 1 Bos 167,

On the same principle if its being against the public welfare a Bond or contract to support maintenance is void 4 Bl 135, 1 Tow 172,

On the same principle a contract with an alien enemy is void 2 Roll 173, 1 IR 35, 3 Lev 48, 1 Bos 172.

So an Insurance on the property of an enemy is void because of the interest which the insurer has to protect the enemies commerce. 8 J.R. 548, 6 J.R. 35, 1 B. & N. 45, 1 East 16475, Doug 234,

But this rule is not universal thus a ransom contract with an enemy is good. This is a contract to pay a sum of money for the ransom of a captured ship. But this contract must be enforced in the admiralty Court and cannot there be enforced until the conclusion of peace March 2, 33, 608, 37, 3 Burr 1734, 1 Bl. R. 563, Doug 619, 6 J.R. 23. A hostage is generally given as security but if he dies the contract remains, Doug 619,

And indeed all contracts in general made with an enemy and arising out of a state of war which tend to mitigate the evils of war are binding, on this principle treaties of peace and contracts to exchange prisoners are binding Doug 619,

But in England by 22 Geo. 2. ransom contracts are prohibited March 2, 33,

On the same principle of its being against public welfare marriage Brothage contracts are void Show. Parl. Cor 96, 1 Foub 245, 1 Burr 474-5, 8 J. Dig 184, 3 Lev 411, 1 Pow 174, to 190,

2. Again contracts opposed to any principle of the Law are void. e.g. a promise to an agent to pay him a sum of money if he would discharge a debt due to the principal is void 3 Balth 97, 1 Pult 34, 1 Pow 176,

So a promise to pay a Sheriff a sum of money if he will suffer an escape is void 10 Coke 76, 102, Cro Eliz 199,

So also a promise by a minister of justice to do an unlawful act is void and it is immaterial whether the action is brought for the nonperformance of the act or to recover the consideration for doing it in neither case can it be sustained Cro Eliz 201, 1 Pow 176,

Where the fact that makes the consideration unlawful is unknown to the promisee the contract may be lawful - - - - -

As if a Sheriff should arrest a person unlawfully and bring him to an innkeeper to keep for a time and the innkeeper should keep him not knowing that he was unlawfully arrested he may recover a compensation from the sheriff
 Bro Jam 752, Matt 53, 1 Pow 127, 8,

again contracts which militate against morality or decency are void. Cowp 39, 727, 755, 1 Pow 143, 233, 2 TR 610, 3 TR 693,

hence also a wager that I shall not be elected to a certain office is void. Marsh 2, 96, Cowp 39, 1 Pow 182, 2 TR 610,

So also a wager with a judge concerning the decision of a suit is void 1 TR 56, 1 Pow 184,

So also a wager which is a mere cloak for gaming is void and all this because they are against public policy 2 H. Bl. 43, 1 Pow 184

It is a general rule that a wager against public policy is void but a wager between the Plaintiff & Defendant in a suit concerning the decision is good. Cowp 37, 1 Pow 184,

Wagers in general as observed yesterday are good but actions brought on them name of law men much discountenanced by courts
 Marsh 96, 2 TR 610, 3 TR 693,

In this state gaming contracts are all void and also money lent knowingly to game with cannot be recovered back. Stat Con 361.
 Contracts made in fraud of third persons are absolutely void and never can be ratified
 Bro Dig 184, Long 435 or 450, 2 Pow 165, 170, Talk 156, 4 TR 166, 1 H. Bl. 322, 656, 2 TR 703, 1 B. & P. 246,

On this principle in marriage settlements a secret agreement by one of the parties to refund a part or all of the marriage portion is void.
 Bro 248, Bro Dig 184,

So also if the owner of goods to be sold at auction employs a purveyor the contract with him is void
 1 Pow 136,

Contracts again are unlawful and void where the objects of them tend to encourage unlawful acts or transactions of any kind as a Bond given to a printer to indemnify him for

publishing a libel. Hobart 12, Moor 456, 1 Bow 195-6,
So Bonds for committing a felony are void
But if the offence amounts only to a misdemeanor
it is said they are not 2 Str Cas 643, 1 TR 475,
2 Wils 641,

A wager between two persons that one of them
will or will not do a criminal act is void
1 Bow 198-9,

(96) I observed yesterday that contracts contrary to the
statute law are void.

Agreeable to this rule contracts contrary to 12th Ann
for illegal interest are void 1 TR 736, 6 ER 499,
1 Bow 146, 166,

There is a distinction between Bonds for the
performance of covenants or conditions which
are made void by the Statute Law, and those
which are contrary to the common law

If there are any of those covenants or conditions which
are void by statute in a Bond the whole Bond
is void the bad part vitiates the good But if the
covenants or conditions are made void by common
Law then the void covenants or conditions ^{only} are ~~void~~
void and the rest of the Bond good 2 Wils 351,
1 Vent 237, 1 Bow 199,

If a Bond reserves unseasonable interest the whole bond
is void although there are other conditions that are
good But if the high Sheriff should take a Bond
from his deputy conditioned to save him harmless
and also conditioned not to serve any process
only to a certain amount the last condition
would be void at common law but the other
condition and the remainder of the Bond would
be good. 1 Bow 200, 4 Bar 434, 1 Vent 237, 2 Wils
351,

This distinction is generally considered as
arbitrary. I think however it arises from the
construction and phraseology of statute law
which says the Bond shall be void and not
from any inherent difference between Com-
mon Law.

But there is an illegal contract under no right that
can be enforced yet sometimes if they are executed
the court will not set them aside.

The rule is this, if both the parties to the contract are "particeps criminis" and the criminal act contemplated by the contract is committed the sum paid as a consideration for it cannot be recovered back. Lang. 451 or 458, Bul. 121, 131-2, Stark. 22, 43 R. 578, 1 B & P. 9, 298, Casp. 790, 2 B. & P. 1012.

But where an illegal contract remains unexecuted as to the criminal act the money paid as a consideration for the illegal act may be recovered back, Bul. 430, 132, Lang. 471, 1 Pow. 202, 216-7.

2. Lushington seemed disposed to question this distinction, and it appears to me to be opposed to principle. 7 T. R. 535 but the rule is well settled.

If an illegal wager is laid and the money is deposited with a stakeholder if he pays it over with the consent of the loser to the winner it cannot be recovered back. 5 T. R. 575, 1 B & P. 3, 294, Lang. 070 note.

But if it has not been paid over either may recover the part he deposited and this although the risk has been run and the illegal act committed. 5 T. R. 405, 3 East 222, contra 4 Johns 426.

But if the stakeholder pays the money to the winner without the losers consent can it be recovered back?

See 2. Elliot's Reports and 1 L^d. Ray. 99, 5 T. R. 609, 1 B & P. 297, 1 W. Bl. 64, 2 Bl. R. 1075, 2 Wils. 509, 2 S. P. 25.

Under our Stat. 361, it may be recovered back.

There is one case in the English Books where the money was recovered back after it had been paid over with the consent of the loser. 7 T. R. 535 see also 1 East 98, 4 Johns 426.

On the same principle money paid to procure an office may be recovered back at any time before ^{the} office is procured. Lang. 471, 1 Pow. 202-6, 206.

Again. But if the party who has paid ^{the money} for the illegal contract was not particeps criminis he may recover it back although the contract has been executed on the other side and the illegal act performed as in the case of *Young*. Casp. 791, Lang. 451, 671, 1 Stra. 915, 4 T. R. 561, Bul. 1. P. 130, 1 W. Bl. 65, 1 Foul. 218, 235, Contra Stark 22.

A promise made in consequence of a previous agreement⁹
to do an act contrary to positive law which agreement
has been executed is good as if A and B agree to smuggle
which they do and lose money in the transaction
A. pays the whole of the loss and takes a security
of B to pay his half this security is good for
the promise is nothing but to pay a loan of money
4 Bur. 2069, 3 J.R. 418, 2 N. Bl. 374, Watson's Trustees
1 K.O. 6 J.R. 61, 405, 7 J.R. 630, 2 B. & P. 372-3

And it has been holden that if one pays with the
privity of the other the law will raise a promise
so that he may recover. 3 J.R. 418;

But now it is not law 2 N. Bl. 377, 6 J.R. 61,
405, 7 J.R. 630, 2 B. & P. 372-3, 3 Ves Jr

If one pays money so lost without the privity
and consent of the other he cannot recover it
back. 2 N. Bl. 374, Marsh J. 418-4,

If one makes a contract the making of which
is illegal he may be bound although he can
not claim under it as if a Clergyman should
trade and make a Bill of exchange he is
liable on the Bill although the his making the
Bill was a criminal act. So also a smuggler
is liable to the Bankrupt laws although his
trading is criminal.

A regulatory Contract is of course void as is a
contract. 1. Paw 235b,

A contract which voluntarily affects the interest of some
third persons is void eg. one which tends to intro-
duce indecent crimes or concerning a third person
Bond 729, 35, 3 J.R. 699, 1 Paw 232-3,

3^d The third requisite to a good contract is that it be
certain. Hence if A promise to deliver goods to
B in a short time the promise is void for uncertainty.
1 B. & P. 98, 97, Bro. Jan 250, 1 Paw 185,

Still however a promise to pay ^{a sum of} money without
naming any time the promise is good and the
money payable immediately 7 J.R. 124, 427
But if one promise to do any collateral act
i.e. any other than the payment of money and
no time is mentioned he has his whole life-
time to do it in. 1 Paw 185.

But notwithstanding this it is a maxim that
 that is certain which can be rendered certain
 by any known standard. Pop 148, 1 Pow 180,
 Cro. Eba 194, 1 Keb 56, 65,

(97) Contracts are of two kinds executed and executory
 An executed contract is one by which a present inde-
 feasible or vested right of future possession is conveyed.

An executory contract is one whereby no property passes
 immediately but is preparatory to a future transfer and
 consummation 2 Bl. 445, 1 Pow 255,

As it is one where one performs immediately and
 the other is trusted or where both are trusted Pow. ib.
 Mr Powell distinguishes ^{express, implied and Constructive} contracts in to [Constructive
 is ~~and~~ Superlative, ^{and unexpressed} 1 Pow 256 on all.

They are express which he calls constructive, e.g.
 in a covenant he, "whereas" "I have" or am possessed"
 he calls a constructive covenant that he is
 possessed of the thing but it amounts to an express
 covenant Cro Jac 187, 668, Yelw. 1312. 1 Lev 24
 Tray 14, 1 Leon 126, 2 Ex Cas 659,

So also an exception in a deed intended may amount
 to a covenant. This Mr Powell calls a "constructive
 covenant" but it is an express covenant that the estate
 or thing excepted shall not pass Cro. Eliz 657, How
 17. 1 Leon 117, 11 Co 50,

So also a reservation of rent in a lease is an express
 covenant he, to pay it Cro. Eliz 657. Stra 487, 1 Vent 10,
 Cro. Jac 399, Pop 136-7, 1 Roll 578, [Robert 132, 1 Leon
 246, 1 Pow 245-4]

Implied contracts on the other hand are those
 which are neither expressed in terms nor arise
 from the construction of the language used
 but those that arise from the necessity or the
 nature of the contract as if A orders goods to be
 sent him by B. here the law raises a promise to
 pay for them 1 Pow 245-6,

The action of indebitatus assumpsit is founded
 on this implied promise or contract. 1 Pow
 255-6, Plow 15, 1 Samuelson 322, 2 Bl 36,

Indeed. Implied contracts are nothing more nor less than contracts, not express for they are convertible terms.

If a lessee holds over there is an implied contract that he shall hold for another year at the usual rent - 1 Bos 155, 258,

A purchaser of lands becoming bankrupt and only part of purchase money paid equity will imply a covenant that the land shall stand charged to answer for the remainder, 1 Bro Ch 423, 3 Atk 272, 1 Bos 247-2, but if a security has been taken that will make the contract express to only on necessity 1 Bro Ch 423.

Contracts are absolute or Conditional

Absolute

Absolute where one binds himself or property unconditionally. as if one in consideration of a lease promises to pay rent

Conditional

Conditional where the obligation depends entirely or in part on an uncertain event by which the contract may be suspended enlarged defeated or qualified 1 Bos 259, 2 Bl 152, 1 Inst 201,

Instances of conditional contracts 2 Bl 154, Shaw, Parl. Cas. 43, 1 Inst 201, Park ser 712, Dyer 91, 1 Bos 261,

As to unlawful conditions. the effects of them are different according to the nature of the contract

1st If the contract is executory the condition being unlawful the whole Bond or contract is unlawful and void 1 Inst 206, 2 Ed Dig 175, 182-5,

The reason is because the contract is executory and no one can acquire a right of enforcing it by doing an unlawful act.

The rule is the same if the condition tends to encourage unlawful acts or omissions, 2 Ed Dig 175, 185, 2 Vent 109, 2 Wils 344, 3 Lev 411,

So also if condition be against public policy 2 Ed Dig 183-5, 1 P W 181, 4 Bur 222-5,

But on the other hand if an unlawful condition be annexed to an executed contract the condition only is void and the conveyance grant or contract is good and absolute. The reason is, the law is not required to enforce such a contract for

it is enforced also when it is executed. If one make a promise to another on condition for so an interest met the condition only is void and the promise good for this is an executed contract. 2 Bl 157, 1 Inst 206, 1 Burr 261-2, But although the effect of an illegal condition is an executed and an executory contract is different still the object is the same i.e. to take away all inducement to the commission of crimes or the violation of the Law.

But the rule as to executed contracts holds only where both parties are *in pari delicto* for if they are not the innocent party shall be aided. e.g. Usury.

The principle on which these cases depend is that the Law will not aid a criminal party nor permit any inducement to violate the Law.

Bonds in restraint of marriage are void because executory, 4 Burr 525, 3 B. & P. 143-4, 2 Vent 109 & Wils 344.

Any contract to induce an immoral act is void otherwise if the condition had been executed and the bond given in consideration of its being executed 3 Burr 1564, 1 Bl R. 517, 3 Wils 337, 2 B. & P. 432.

All conditions totally repugnant to the nature of the contract are void as a condition in a conveyance that he to whom the estate is conveyed shall not alien or take the profits but a distinct bond that he will not alien or take the profits is good because by aliening he will not forfeit the estate but merely the penalty (sum authorities)

(98) Impossible Conditions

Are of two kinds. those impossible at the time of making of the contract and those possible at the time but become impossible afterwards.

First of conditions possible at the time, become impossible afterwards.

If it is annexed to an executed contract the contract is annulled & the party discharged from performing the condition 1 Inst 206, 1 Burr 264-5, 444-6, 10. Mod 264, 1 Robt 45, But by the usage

the condition is supposed to become impossible by the act of god. for if it is by his own act the contract is void. he cannot take advantage of his own wrong. 1 Dow 422, 1 Inst 210.
Reason why cont. is good in first case is because it is executed and cannot be diverted without the promisee's consent.

So also where condition to executed cont. becomes impossible by act or operation of Law 2 R. 1122, 3 Bna Bull. 383, 5 D. 267, Talk. 198, 8. Mat 51.

So also if rendered impossible, by the act of the party claiming by reason of the non performance. ^{same authorities}
But if by act of other party, the contract void.

But if a possible condition is annexed to a contract executory, and afterwards becomes impossible by act of god. the Law is, the effects are direct by the reverse i.e. the contract is void or the obligation saved. 1 Dow 265, 417, 422, Talk 172, 1 Famb 209, 7 T.R. 384, 1 T.R. 634, 2 R. 6. 126-8.

Reason is. the contract being executory it can be executed only by an action at Law. and the act being impossible without his default the Law will not subject him for not doing an impossible act.

But if he renders himself incapable to perform the act he is immediately liable although the time of performance has not arrived. 3 Coke 21, 1 Esp. Cas 430, 2 Esp. Cas 522, 6 Johns 110.

To elucidate the above reason. A person gives a bond conditioned that he will appear as a witness and give before time the obligation is saved
So a bond to marry B. B. marries another person obligation saved same authorities. and so 1 R. 240, 4 Coke 2, Cro 313 374, 1 Inst 206.

So an obligation conditioned to build a house in a limited time and is prevented by obligee the obligation is saved. 1 R. 240, Doug 659, 2645, 3 T.R. 590, 25 R. 383, 1 Inst 619, 1 Esp. R 53.

But if the obligation annexed to an executory cont. be to perform one of two things one of them becoming impossible does not discharge the obligee 1 R. 240.

It was formerly thought different 1 Cow 394, 6 Coke 24,
40 Mod 26, 1alk 170.

So if an obligation becomes partially impossible the rest
must be performed. this is the doctrine of *si proes. i.e.*
as much as may be. How 244, 1 Inst 352, 219,
2 H Bl 163, 581, 2 Bl R. 371, 1 Famb 287, 211. 2 T
R 254, 2 Cow 31.

Remark. the obligee is not bound to accept such
a performance (same auth.)

If a bond contains a clause making the party bound
a judge of performance the clause is void and the
jury must be the judges, 2 Atk Rep 428.

If the condition be impossible at the time of making
the contract its operation depends on it being Precedent or
Subsequent.

A Precedent condition is one which must be performed
before the right or estate can vest.

Subsequent is one by which it may be defeated
2 Bl 156-7, 1 Inst 206,
If a precedent condition be impossible at the time of
making the contract, the whole contract is void ab
initio 2 Bl 157, 1 Inst 205, 1 Cow 266,

The effect I should think would be the same if the precedent
condition was possible at the time but become impossible
before performance but there are no authorities.

If condition be unlawful the rule is the same 2 Bl 157,

But if a Subsequent condition is impossible at the
time the condition is void and of no effect but the
contract is good and absolute because the Law
supposes the parties never intended that an impossible
or unlawful thing should be performed 2 Bl 156-7,
1 Inst 206, 1 Cow 266,

And if a contract is executory and the impossible
condition subsequent the effect is the same and
the measure is the contract is executed in both cases
before the subsequent condition can effect it and
a void condition cannot defeat. 2 Bl 157,

But if the impossible stipulation is an executory
contract is in the body of the contract, the
contract is void in the whole. because the condition
must be in effect precedent 1alk 172, 1 Cow 267,

There was a distinction at common law between simple and special contracts but the Statute 29 Charles 2^d has introduced a further distinction unknown to the common law viz. between parol & written contracts not sealed. for the stat- in 1 Bac 72, 1 Pow 269, 2 Bl 466, 3 Bl 459, Our Stat as far as it goes is substantially the same as the English. Stat Can^{va} 354,

The operative clause is that there be some note or memorandum in writing made at the time and signed by the party or his agent.

The English statute affects six classes of contracts

Ours only five viz

- 1 Any writ by Exec^r or Adm^r to answer out of ^{his} own estates for any debt or duty of their testators,
 - 2 Any promise by one to answer for the debt duty or default of another.
 - 3 Any contr. in consideration of marriage
 - 4 Any contr. for the sale of lands &c or any interest in ~~them~~
 - 5 Any contr. not to be performed in one year from the making of it.
 - 6 In the English statute but not in ours Any contr. for the sale of goods of the value of ten pounds or upwards - - - Shall be utterly void unless some note &c. be made. at the time &c.
- The last clause extends to ~~extended to~~ executed & Exec^y contracts Roberts on Frauds 111, 2 W Bl. 637 3d 14,

As to the 4th Clause. for the sale of lands &c any ~~contract~~ parol contract concerning them for not exceeding three years shall operate as a lease at will and by late decisions a lease at will is construed a lease for a year so that now a parol lease for less than three years would be construed a lease for a year & T R 3, The object of the Stat is to prevent fraud and perjury in proving such contr. by parol evidence

(99) As to the first clause of the statute.

^{9th}/₁₁ It has been said that if the Executor &c. has assets of his testator in his hands he is bound by ~~the~~ ~~the~~ Statute ~~the~~ his parol promise to pay a debt of testator out of his own estate but not now law, for if he has assets execution goes de bonis testatoris 1 Ves 126, 5 T.R. 8, Rob. 206, 7 T.R. 350,

The existence of a consideration will not make a novel promise in such a case binding a fortiori proof of affixt will not, 5 T R 690, 7 T R 355-1 Contra Corp 288, but not law.

Submitting to arbitration it was once thought took a parcel promise out of statute, but not Law 12 R. 691-2, 5 J.R. 6, 7 J.R. 4 & 3, But if on a submission the arbitrator award the execution be to pay a certain sum this precludes the want of assets.

75 or 45-3,

5 J.R. 453, .
Once determined that the payment of interest
was such a promise as threw the onus pro-
bandi whether affects or not upon Executor or
5 J.R. 453, .

5 J. R. R.
But the acceptance of a Bill of exchange by the
Executor &c admits assets to that amount Chit 2.
B2-3, 112, 171 B1622, 3 W111, 2 Stru 1260,
So also a transfer of a Bill by the holders Executor
is an admission of assets to that amount. Chit 111-2
3 W111, 2 Stru 1260,
such contracts to be reduced

3. Webb, 2 Ohio R.C.S.,
The statute's requiring such contracts to be reduced
to writing, does not imply that if the promise
is in writing, they are bound of course for if
the contract is unsaid the want of a consideration
will vitiate it 7 JOK 350 note

A written promise under the Statⁿ will not bind
und^r the Exceutor^{ce}. would have been bound by
such a promise at common Law 4 T R 350 note Prob.
O. 1 Dec 186,

So make the Executor be liable on his written promise
there must have been an existing debt due from
his Testator - ob. & ob. note 2 Saund 136, Bro gam 47,

And the consideration upon which the Excelsior Co.
promise is made must appear in the writing
or he will not be bound. 5 East 10, Rob 116, 2078.
1 East 207

And he must have been administrator at the time of making the promise or he cannot take advantage of the contract not being in writing. for if he promises to pay a debt if he is appointed Admin^r or if he is so appointed he is bound although his promise is not reduced to writing Amb 330, Rob. 201,

In an action against an executor on his written promise to pay a debt of testator you need not move affects Rob 255-6,

As to the second clause, Any contract to answer for the debt Default or misbehavior of another.

Under this clause this general distinction must be observed viz. if the promise is original it is not within the statute but if it is collateral it is within it and will not bind unless in writing

An original promise is one when the party promising means to make himself the original debtor.

Collateral where he means to make himself a security only 2 Lth Ray 1087, Cowp 227, 1 Wils 206, 3 Burr 1888, Exp 310-2,

This is the universal criterion to which there is no exception

- 1 First then a promise is original when the third person is not liable at all to the promisee such a promise is not within — Stat^{te} 21 Geo. 21 Geo. 3 Burr 1921, Rob 209, 216, Bul N.P. 281,
- 2 A promise thus made is original when the third persons liability ceases on the promisee's being made this rule however has been doubted Rob 255-4,
- 3 A promise is original when there is a consideration arriving to the promisor out of a new and distinct contract or transaction 3 Burr 1886, Rob 252 3 Exp 86 2 East 325,
Generally however a mere promise is within either of the three above rules it is not within the statute and of course binding
But where the promise is merely in aid of a third persons subsisting liability as to procure further assets or where the promisor is a mere guarantor it is within the statute and void unless in writing 5 Mod 225, 2 Wils 94, 1 Wils 206, 1 Burr 158, 2 Sug 455.
To illustrate the three above distinctions,
1 Deliver goods to A and charge them to me, this

promise is original and need not be in writing
2 J R, 40 1 W Bl 122, La Ray, 1087, Rob 209, 216,

on the other hand, believe goods to A and if he don't pay
you I will, here the promise is collateral and must be
in writing.

Again, supply my mother in law with bread and I
will see you paid here the promise is prima facie
collateral 2 J R 40-1, Rob 223, La Ray 224, 1 Bos & Pull 154,
Carluh Salk 58,

Ed Mansfield's rule see Corp 228-9, 2 J R 41, Rob 209-10,

Rule now is this that in a promise in this form i.e.
"I will see you paid the court consider all the circum-
stances of the parties at the time 1 Bos & Pull 151, Rob 212, 223,
What circumstances? I answer many. I says to B furnish
such a seaman with necessaries for a voyage to Canton
and at the end of three months I will see you paid.
here is the circumstance of the probable absence of the
seaman at the end of three months, &c

A recommends B as worthy of credit, the trader says "I
don't know B" A says "you know me I will see you
paid, here the promise is collateral and within the Statute
2 J R 40. Esp Dig 101-2, Rob 210-1,

I promise if you will let your horse to B he shall deliver
him back, collateral, Rob 232, Salk 27, 6 Mod 24 & 2^d Ray
1085, 3 Salk 15, Wott 606,

It is a general rule that a promise by one that a third
person shall do an act which he undertakes to do
for that act is collateral and void by the statute
2^d Ray 1085,

But if I promise to do an act for a third person for not
doing which he is not liable my promise is original
and binding Rob 223

As if an agent buys goods for principal without
naming him Deak Ev, 213, 3 Burr 1921, see also La Ray
1085, Rob 219, 222, 232,

If a promise is made by any of several persons already liable
to pay the whole debt the promise is original Rob 227
5. Mod 205, Carluh 302, 2 East 325, 2 Esp 484.

It is a general remark as to contracts of the second
Class, that when the promise is original the proper
action is *indebitur assumpsit*. But when collateral
and in writing *Special Assumpsit* 1 Burr 373.
3 Lee 363, La Ray 1085—

2 As to the second distinction. When the liability of the third person is extinguished by making the promise the promise is said (and I think correctly) to be original 3 Burr 1888, 1. New Rep 130-1, It is however doubted by Roberts. Rob. 223,

A promise to purchase a debt against another is clearly original. So I think a promise to pay if he will destroy or discharge the bond is also original and binding notwithstanding the Statute Rob 226, 1 New Rep 130, 2 East 325,

3 As to the third distinction. Where there is a consideration arriving to the promisor out of a new and distinct contract. the promise is original. The leading case on this subject is that of *Mims vs. Leaper* 3 Burr 1886, see also *Peak Ex 213*, 2 East 32, 3 Esp Cas 86, Sulk 25, 28, *Ld Ray* 75-9,

When a person is under a prior moral obligation to do an act for another a subsequent promise to pay a person for having done it is original and not within the Statute. *Bul NP. 231*, *Peak Ex 213*,

(100.) Some general cases under the second Class of Contracts

A promises to pay B a certain sum if he will withdraw an action of Assault & Battery which he has pending against C. The promise is original for it is not the debt of another until judgment. 1 Wils 305, 2 Bay 457, 4 T.R. 204, Rob 208, 2354, *Peak Ex. 214* And it is a general rule, that to make a promise Collateral there must be a debt or, ascertained or capable of being ascertained at the time of the promise is made (same author)

A promises to pay B if he will stay a suit for an existing debt against C is Collateral 2 Wils 92, 3 Burr 1887, 4 T.R. 201, *Alton* 873,

So also if he will withdraw an action of Tress, for this is the duty of another to pay 455, see also on the subject 15 R 557, 4 Burr 3482, 6 T.R. 525, 7 T.R. 1121, It is said that when there is a new consideration a novel promise is answer for the debt or is good. *Ant 55*, 2 Burr 1887. but not how if it were every promise would be good

and this clause of the statute in effect repealed
2 Will 94, Rob 252-3, But. 57, 281-2, 7 JR. 201, Stra 23,
2 Jay 257.

But judicial confession of a parol promise as it excludes
the necessity of proof will take a parol promise
out of the statute for now no danger of perjury
and besides the statute was not made to prevent what
is a ^{self} ^{deception} ^{himself} by swearing against
his own interest. And it is a general remark applicable
to the whole statute that the parol promise is not
void by it but merely the proving it by parol
testimony, if it could be proved ^{by other evidence}, the promise is good
Pack 75, Pack Ev. 204, Rob 238,

Rules of pleading, see title Pleading. I will merely state the
general rule here. If a collateral promise is made
in writing ^{or not to marry}, the ^{off} in declaring on it need not
aver that it is in writing Ray 450, But. 10, 279,
3 Bur 1870, Cowp 289, 12 Mod. 540, 4 Burr 555, that
it must be averred in a plea in Bar re. 2 Will 49,
But. 279, Rob 202, note.

And where the collateral promise is parol and not averred
to be in writing a disclaimer to declaration will
confess it to be in writing. 7 JR 353 note 1 Post 47-8,
A parol promise in one entire transaction to ~~pay~~ the
debt of another and also to do some other act the
whole promise is void. Reason. the promise is
entire and a person cannot sever on a part of
an entire contract. 2 Vent 224, 7 JR 201, 204,
1 New Rep 130, Rob 172-3 note, 231,

3. As to the third clause of the statute. Promises in
consideration of marriage &c.

This does not include a promise to marry. The statute
relates only to contracts made in consideration of
marriage. But. 282, 1 Foul 179, 1d Ray 386, Stra 34,
1 Cow 277, 8, 1 JR 618, Que 24, 526, Such an agreement
must be in writing.

An agreement that the prior agreement shall be
reduced to writing does not take the prior agreement
out of the statute 7 Barr 279, 281, Que 24, 402, 3 Atk 514,
But if such additional agree^{tt} was made and prevented
from being executed by the fraud of the other party.

Equity will enforce the agreement on the ground of fraud² 1
1 Eqr Cas 19, Rob 198, 136-7, One Ch. 526, 1 P. M. 614,
No suit can be maintained at law. not because the parol
promise is void for equity will enforce that on the ground
of fraud. Stra 236, 2 Lev. 146, 1 Ves Jr 196, Rob 197,

Statute says. Some note or memorandum in writing made
at the time agreed by the party bound. See
Hence any memorandum or, although it is not a
binding agreement itself if it shows the terms of the
agreement is sufficient to take it out of the Statute
e.g. a letter written by one party to the other containing
the substance of an agreement 1 Toulb 179, 2 Bro Cha 32
3 Bro Ch 314, 1 Ves Jr 330, 1 Pow 247-8, 1 Vent 361, 3 Atk 513,
But where the writing is in the form of a letter it
must appear the other party accepted of the terms
contained in it and consummated the marriage or
did the act on that ground 1 Toulb 179, 2 P. M. 65,
9 Mod 3, 1 Pow 247, 290,

Hence where the letter had not been recd when
the marriage took effect it was held not a binding
agreement or rather no agreement at all 1 Toulb 193,

A letter to one's own agent stating an agreement
is sufficient memorandum 3 Atk 503, Rob 129,

But such a memorandum must furnish the terms
of the agreement or it will be defective for
uncertainty, 1 Toulb 179, One Ch. 560, Stra 426,
10 Atk 12, 1 Pow 290,

^{1th} 4. As to the just clause of the statute for the sale of land see.

Under the word lands which includes things annexed
to the land yet if they are sold for the purpose
of being severed the contract is not within the
statute and need not be written e.g. as contracts for
trees. Corn, grasses be cut for potatoes in the ground
it is said it must be written. 6 East 602, Eld. 154 62,
11 East 302, 1 B & P. 377, 1 Com. Com. 74, 5 P. 3 Bay 470
Peck Ex. 214, Bul. N. P. 242,

Hence it has been determined in this state that a
parol sale of a running gear of a mill ^{was good} because it
was to be severed 3 Bay 476

A parol contract between the owner and occupiers of lands that each shall have a share of the profits is good 1 B & P. 397,

A parol promise to pay money for the conveyance of land is good 1 Root 47-8, 479,

It was formerly holden in Conit that the action of Indeb. Assumpsit would lie to recover the value of land sold on the quantum valebat but this is now overruled.

But notwithstanding the Statute there are cases where a parol agreement in such cases will be binding, as if a parol agreement is proved consistent with the Statute i.e. without parol evidence

First where there is no danger of fraud by perjury as where on a Bill in Chancery the respondent in his answer confesses the contract here it shall be enforced for there is no danger of fraud or perjury. and not much danger that the defendant will perjure himself by swearing against his own interest. 1 Ves 221, 441, Prec. Ch 208, 374, 2 Atk 100, 155, 3 Do 3, 1 Bl R. 600, 2 Broo Ch 568, 586,

Powell says the Statute is complied with because the promise is now reduced to writing. very strange! Is there any note or memorandum made at time and signed by party? I think not.

It has been determined that if the defendant confesses a contract in his answer but in his plea insists on the Statute he is not bound by contract Rob 156, 161, 2 Broo Ch 506, 4 Ves 423, Peak Ev 216

On the other hand It has been determined that if insists on the Statute in his plea after a confession of the contract it will avail him nothing and he is bound by his contract after it is proved. Prec Chan 374, Peak 216, Rob 159-0, 3 Atk 3, 2 Do.

155, 2 Broo Ch 508, 1 Bl R 600, Contra see decisions at law 3 W Bl. 63, Rob 157, 6 Ves 454, 4 Ves 423, 2 Broo Ch 563-4,

There are other exceptions founded on the principle that a statute made to prevent fraud ought not to be so construed as to make it protect fraud. Such would be the case if by not performing his part of the agreement he would practice a greater fraud than the statute was made to prevent.

On this principle it is held that part performance of a parol contract for the sale of land, &c. at the request or with consent of the other will take the promise out of the statute for otherwise there would be an additional fraud.

As if A makes a parol lease to B and B enters in pursuance of it and erects buildings and makes other improvements, this is such a part performance as will take the contract out of the statute. 1 Fomb 172, 1 Cow 296, 1 Bl R 630, 1 Bos 221, 43, 297, 3 Atk 100, 7 Ves Jr 341, 3 Co 378, Rob 130-4, 3 Woodes 433-5, 1 Bos Cha 417, 1 Bos R 397,

Delivering possession of land, &c. by vendor in pursuance of a parol agreement is sufficient ^{part} performance on his part to take the contract out of the statute. 1 Pow. 299, 300, 2 Bos 363, 455, 2 Esp Cas. 48, 1 Tra 783, 3 Bos. Cha 409, 1 Bos Cha 518, 7 Ves Jr 747,

On the other hand payment of part of the purchase money in pursuance of a parol contract for the sale of land, &c. is sufficient part performance for the vendee to entitle him to a conveyance. 1 Pow 304-5, Rob 153-5, 3 Atk 2, 1 Ves 43, 222, 1 Fomb 175, 4 Ves Jr 720, 3 Co 413, Rob 133-4, Doubtless see 2 Esp. Cas. 46, Sugden 74, 81, 9 Ves Jr 234, Conin Con. 42,

Payment of earnest is not a sufficient part performance if it is not ^{at} once given after the agreement and in pursuance of the terms of it, but merely an additional solemnity to the agreement. 1 Bos Cha 560, 1 Fomb 175,

Farwell indeed observes that damages for the non performance may be recovered where there is earnest paid but I don't see on what ground unless he means that the money paid in earnest is the measure of damages. 1 Bos 308, May a receipt of part of the money be proved by parol? Yes, for it is idle to say (if part performance will take it out) it must be proved by written evidence for ^{then} there is no need of proving part performance. 1 Pow 307, 3 Atk 4, 1 Bos 183-4,

But to take a parol agreement out of the statute by part ²⁵
performance the act done must have been one by which
if the agreement is not enforced he will be prejudiced
Hence part performance by one of the parties will not
make the parol agreement good as to the others. 7 Ves 341,
Rob 134, 6 Bro. Parl. Cas. 45,

Again, the act done, must have been done with a view
to part performance.

Thus, a lessor agreed with his lessee to give him a
new lease after the first should expire. The lessee
held over. This was adjudged no part performance
for it did not appear to have been done with that
view. 3 Ves 374, 1 Pow 309, 2 Bro. Ch 561, 1 do 412,
1 Foul 175, 3 Atk 4,

But giving directions for the performance of a parol contract
concerning land. Having it priced, surveying it going
with the vendee to view it &c is not a part performance
1 Foul 175, Rob 139, 162, Amb 546, 1 Bro. Ch 412, 3 Ves 374,
379, 6 do 41,

But on a parol contract in consideration of marriage
the act of marriage is not of itself part performance
for that would repeal that clause of the statute
1 Pow 309, 1 Bac 74. Cree Ch 561, 434, 1 P. W 614
Rob 196-8,

It seems however that a parol contract made by a
third person would be taken out of the statute by
the marriage itself if the marriage took effect
by his consent 1 Pow 294-9, 2 Vern 373, 1 Pow 309,

The cutting down timber trees on land has been
held (if for the purpose of clearing it) to be a
sufficient part performance by that party who
did it or contracted to do it. 2 Eq. Cas 29, 1 Pow 304,
On the ground of preventing fraud a written contract
may itself be contradicted by parol evidence 3 Atk
389, 1 Foul 184, 1 P. W 620, 2 Atk 203, 1 Eq. Cas 20,
1 Pow 294,

Again a parol agreement of any kind may be proved
where it is only the inducement to the action
of fraud.

As if there is a written agreement for the sale of a
chattel and the vendor warrants it sound by parol
then the parol agreement may be proved in contradiction
to the written 2 Day 531, for example in powers of Chancery.

An action of Indeb. Assumpsit will lie for use and occupation of land under 11 Geo. 2^d and a parol lease may be proved not for enforcing an agreement but ground a recovery for the use &c. Exh. Dig. vol. 165, & J. R. 322, 1 do 378, 2 Bl. R. 1249, 1 Wils. 314, 1 W. Bl. 235, that assumpsit would not lie at common law see Hob. 284, Chit. Pl. 97, Bul. & P. 137, Peak Ev. 241, In Cont. we have no such stat as 11 Geo. 2 But our courts have adopted the rule and principles of it. 4 Bay 228, 5th 4 to the fifth clause of the statute. Conts not to be performed in one year from the making.

This clause does not extend to agree^{ts} concerning lands &c for such agree^{ts} the statute had already provided 1 Cow 276, 1 Wem 159, & J. R. 327,

But where the performance of a contract is to take place on the happening of a contingent event. which may or may not happen within a year it is not within the statute as a contract to pay when a certain ship shall return from the East Indies Salk 208, Bul. & P. 284, Atk. 506, 3 Burr 1278, 3 Salk 7, Peak Ev. 214, So a promise to pay a sum of money on the marriage of another 4d Ray 316, Prob 187,

So parol promise to leave a sum to a person in his will on death 3 Burr 1278

And in no case when the parol contract may be performed within a year is it within the statute even though it was not so performed. 4d Ray 317, 3 Burr 1281, Peak Ev. 244,

This clause extends only to such contracts as are not by the terms of them to be performed in a year

In Cont. it has been determined that where the Cont. is made on a continuing and accruing consideration it is good if it is to be performed within one year after the consideration has ceased to accrue

As where a father contracted with another by parol to board his son five years. this was holden good if to be performed within six years from the making 1 Root 49,

I find no such distinction in the english books.

(12)
Rules applying to all classes of writ in the Statute. 27
The construction put upon this statute is the same in
Law and Equity 3 Bl 433

"Same note or memorandum of the contract must be
in writing" the form of the writing is not material
1 Toulb 179, 1 Dow 247, 2 Bro 66 3^o.

but the writing must show the terms of the contract
with certainty or refer to something by which they
may be made certain 3 Bro 66 3^o, 1 Des 330, 2 B
2 O 234, Rob 115, as if the writing states that the
conveyance is for the same price that I gave for it
the writing is sufficiently certain

but if the thing referred to will not make the terms
of agreement sufficiently certain it is void and the
terms cannot be explained by parol evidence to make
them more certain. 1 Des 326, Rob 104 note

An advertisement is a sufficient note 1 Bl 259,
3 Burr 1921.

The consideration as well as the promise must be in
writing except under the sixth clause of the English
statute where the word bargain is used which is
held not to extend to or include the consideration
5 East 10, Rob 116, 204, to exception see 6 East 307,
It is immaterial in what form the writing is. Thus a deed
inchoate as such may be construed as an executory
agreement to convey or rather is considered as evidence of
such agreement. But this only in Equity 2 P W 242, Rob 107.

The agreement must be signed. What is a sufficient signing?
If the name of the party is written in the body of the
instrument by himself or authorized agent if it appears
to be done with intent to give the instrument effect
it is a sufficient signing 3 Lev 1, 46, 9 Des 249
2 B & P 234, 1 Est. Co 190, 3 Str 399, 1d Ray 1376,

But if it does not appear to have been done with an
intent to give the instrument authenticity it is not
a sufficient signing 1 Toulb 166, 1 P W 471, 10 P W 88, 1d 122
Formerly thought that the making an attestation in an
instrument was a sufficient signing but now overruled
1 Borne 220, 1 Toulb 163-6, 1 P W 470, 1 Dow 244,

But one's signature as a witness where he knows the contents
of the writing, to any stipulations in it on his part
he is bound 1 Des 6, 1 Will 13, Rob 123 4,

It is a rule that if the party against whom a

24.

Suit is brought has signed he is bound although the other party is not 1 Bro Ch 564, 9 Ves Jr 351, 1 Pow 286, 2 Wren 373, 1 Ex Cas 20, 2 Ro 32, 7 Ves Jr 265, It is said in the last case cited that one's procuring another to sign is a sufficient signing on his part 1 Wms 247, I can't see the reason of the decision.

The bringing a Bill for performance is a sufficient acknowledgment of a contract although the Bill is withdrawn 1 Ves Jr 2, Rob 124,

It has been held that an auctioneer's subscribing the name of the highest bidder is a sufficient signing for both parties. Bul. 1 P 283, 1 Bl Ch 377, 3 Burr 1921, lately been denied see, 8 J R, 151, that the old rule holds as to sixth clause of English statute see 1 Ex Ch 107, 1 B & A 386, 1 Ves Jr 344, this even doubted see 9 Ves Jr 249,

It is questioned whether mere a contract need be in writing Bul. 1 P 283, 1 Bl Ch 377, 3 Burr 1921,

A printed name may be a sufficient signing 2 B & A 238, Rob 124,

When a contract is signed by an agent it is not necessary that his authority should be in writing 3 Wms 427, 9 Ves Jr 251,

It is not necessary that the identical contract be signed it is sufficient if an acknowledgment that it is his contract is signed by the party 3 Bro Ch 318, Rob 121, 3 Atk 583,

The bare writing an agree^t by the party does not dispense with his signing it 1 P W 770,

The Consideration of Contracts -

The Consideration is the material cause of a Contract.

There are two kinds of consideration viz. Good & valuable. A good consideration is that of kindred or natural affection between near relatives 2 Bl 277, 444, 3 Coke 83, 1 Pow 361. A good consid. in bank executed is good between the parties, but as against Creditors it is in general considered fraudulent 2 Bl 277,

An executory Contr. on good consid. cannot be enforced a Law, but in Chancery will be in many cases 1 Wren 425, 2 P W 176, 1 Pow 361, 367,

A valuable or valid consid. is something of pecuniary²⁹
value as money, goods, Marriage &c 3 Coke 83, 2 Bl 297,
Contracts are divided into two kinds, special and simple
there are at common law no intermediate kind 7 TR 351,
Special. is one that is evidenced by deed or contract
sealed.

Simple. is one by parol or reduced to writing but
not sealed. 2 Bl 465, 295, 7 TR 351, note. Rob. F. C. 99.

In Cont any written instrument containing an express
stipulation is in general treated as a specialty.

All simple conts i.e. (conts by parol or written and not
under seal) which are executory, are void if without
consideration 1 Pow 330, 335, 2 Bl 445, Salk 127,
5 TR 143, 1 Fomb 326, 333.

A cont. it is said when reduced to writing is
good without consideration 3 Bur 1670, 2 Bl 446,
but this is not Law 1 Pow 333, to 342, 2 Do 242,
But negotiable instruments which have been trans-
ferred are good without consid. but these are
governed by mercantile Law Chit. B. 9, 51-2.
7 TR 351 note.

In strictness a consideration is necessary to sealed in-
struments but the Plff. is not bound to prove consideration
nor is the Defl. permitted to deny it i.e. he cannot prove
the want by parol evidence so that whether necessary
or not the deed is good. 1 Mes 514, 3 Bur 1637, 1 Pow 232,
1 Fomb 334, 2d Aug 729, 1550, 2 Bl 295.

The Deed is binding unless the want of a consideration
appears in the instrument itself or some other of
equal authority Rob F. C. 95-7.

- (103) The rule requiring a consideration to every cont.
applies only in its full extent to executory conts.
for if executed it is good without consid. as between
the parties 1 Bac 238, Lang 20-1, Stra 955, Est Dig 577,
& consid. it is said can arise only in two ways
1st From something advantageous to the party contracting
2^d Or it is advantageous to the party in whose favor
the cont. is made 1 Pow 342, 1 Fomb 330. But this
rule is too extensive as I shall try and by show.
1 First a consid. may arise from something
advantageous to the party contracting but.

30 by the way the quantum of the consid. is wholly immaterial provided it have any value 2 Vern. 213, 2 Cow 152, 1 Will 230, 2 Ves 517,

An act or indifferent consid. is not considered as a consid. in Law 8th Ed. 94, 2 Roll 23, Bro Eliz 206. But any act however trifling done by that party, in whose favor the promise is made is a sufficient consideration 1 Dow 343, Bro Eliz 67, 150, Bro 240, and the mere relation of landlord and tenant is a sufficient consideration 5 TR 373,

2^d Secondly a consideration may arise from something disadvantageous to the promisee even if it is of no advantage to the promisor. but an act taken by itself must be disadvantageous Hob. 4, 5, Bro 2am 342, Bro Eliz 74-5, 149, 181, Hob 216, Cow 124,

As a consequence of the first general rule it follows that a consid. will not arise from any thing already past and executed for nothing of advantage can accrue in consequence of such a promise which is already past 1 Dow 348, Bro Eliz 741, 885

442, 8th Ed. 95, 87, 1 Roll 11, in part But though a past consideration is executed yet if past be subsisting at the time and not past the promise is binding 2 Bult 73, Bro Eliz 94, 3 Salk 96, Bro 24 409,

The general rule that a consid. must arise in one or the other of the above ways is too narrow and is now somewhat relaxed 3 Burr 1671-2, Str 933, Warr 64. Thus a cont. on a consid. already past is good if there was a previous legal debt or duty incumbent on the promisee. as a promise by A in consideration that B had buried his child here the burying the child was a previous duty of A. 1 Dow 350, 3 Ray 260, Bro Eliz 134, 3 Burr 1671-2,

Again if there was a prior moral obligation on the promisee the promise is good. as a promise to pay a debt barred by the statute of limitations 1 Taub 336, Ray 259, 2 Bl 445, Cow 290-4, 8th Ed. 95 Bult. 50, 147, 241, Peck 213, So a promise to pay for the nurse nursing of a natural child is good. 2 East 506.

Again a consid. part will support a conv. if the con- sideration arise at the request of the promisor. here the promise complies itself with the part consid. ^{or request} 2 West 264, 3 Salk 96, 1 Mod 105, Bro 22 40, Bro Jan 14, Bro Eliz 42, 24 2, 819 95, 1 Foul 336,

It has been held that a promise to a stranger for a meritorious act done by another will not support an action in the strangers own name for he is a stranger to the consideration. Thus A has transported an B and in con sideration that B will discharge him of it says I will pay I such a sum the promise it is said is not binding 1 Cow 343, 353, 4 TR 330, Bro Jan 647, 2 Roll 441, 579, 1 Best 6,

This rule is now confined to deeds. That it does not hold in simple contracts see 3 B & P 148 note see also 1 B & P 101 & 1 Johns 148, 4 Mod 117, Cowp 443, 5 Burr 2630, 1 TR 659, 3 that it does hold as to deeds see 3 B & P 148 note 3 Lew 139 Carth 77, Bro Eliz 729, 1 Lew 235,

It was always held that a consid. moving from one person would support a promise to a third if he was nearly related 1 Pent 318, 332, 2 Lew 210 Ray 302 1 Pow 353, but now extended to all simple contracts whether nearly related or not.

Where the promise is in consid. of the forbearance of a debt two requisites must be observed

First it must be to forbear the mit perpetually or for a certain fixed period. Second. it must be of an action to which he is liable - meaning a considerable liability on his part. Both these requisites must concur 1 Pow 353-4, Bro Eliz 206, 819 95,

As to first requisite. forbearance for a reasonable time is a period sufficiently certain, Bro Eliz 19, 455, 1 Pow 353-4, 819 95, Nutt 108

As to second requisite. If one is arrested on a void process and promises in consid. of a release from prison to pay a certain sum the promise is void. 1 Pow 135, 3 Salk 96, 11 adrefs 73, 819 94, But the promise is good if there is a considerable liability to a mit date 11 Reg 1 Pow 256, But if from the terms there is no liability the promise is void 1 Pow 157

The mere act of trusting property with another is a sufficient consid. for a promise to some act concerning it 2d Ray 909-0, 919-0, Bro Jan 657. 5 TR 143, 3 Salk 26, 3 Do 11,

The preservation of the honor and peace of a family is in choosing a sufficient consid- for a promise 1. 4th 3, 1. Pow 362,

Or a compromise of a doubtful right is a sufficient consid. 1. 4th 10, 2. Vent 353, 1. Penn 4, 2. Des 284,

It is not necessary that the consideration should be expressly stated to be such 1. New Rep 450, 1. Pow 368, 2. consid. ^{in these situations}

1. When the thing stipulated to be done on one side is in consid- of performance on the other the performance is a condition precedent, Thus A agrees to pay B for building a house here building is a condition precedent to payment. 7. J. B. 130, 1. Vent 177, 2. 14, 3. Salk 95, Hob 106, 1. New Rep 240 note 1. Taub 380, 1. W. Bl 274-5, ^{and must be performed before payment shall}

But what is equivalent to performance will answer the same purpose as performance, Thus if one party tendered performance this is equivalent 1. J. R. 638, 645, 2d Ray 646, Doug 259, Stra 1236, Or if he was at the appointed place and was prevented from performing by the absence of the other party whose presence was necessary or indeed if he was prevented from performing in any way by the other party he has did that which is equivalent to performance 1. East 203, 208, 619, Stra 450, 7. J. R. 125, 2. New Rep 240. C,

(104). Where the premises on both sides are concerned, as if I promise to deliver to B a load of wheat on such a day for such a price these the acts must be done at their stipulated times whether the other is done or not. 1. Salk 320^a, 2. New Rep 240^a, 1. East 203 619, 629, 7. J. R. 125, 4. do. 761, 8. do 566, 1. W. Bl 363, If one promise to do an act in consid- of something to be performed the performance is a condition precedent but if the consid- is to be paid on a day certain then performance is not a condition precedent for the consideration must be paid at the day when there has been a performance or not. 1. Salk 320^a, 1. Taub 381, 2. New Rep 240^a, 7. J. R. 130, 6. do. 572, 2. W. Bl 389,

But if the day of payment is after the act is to be performed performance of the act is a condition precedent and must be averred and proved in an action for the money - 1 Pow 358, 3 Salk 171, 3 Salk 95, 1 Saund 428
2 New Rep 240

3. Where the promise on one side is in consideration of the promise on the other here the promises are independant and an action may be brought on either side without averring or proving performance ~~on the other~~ 1 Pow 359, 360, Doug 665, 1 Vent 177, 2 Ld. Hob. 88, 1 Salk 24.

But a court of Equity will not enforce such an agreement on either side unless the party applying has performed or is ready to perform his part maxim. In that wants equity must do equity 1 Fomb 382, 7 Bro Parl. Cas 184,

A promise in this form "I promise to pay \$100 you transferring stock to me on such a day. I think the transfer a condition precedent see Salk 112 1 Fomb 382 1 Ld. Mod 583, 1 W. Bl 277, 4 T R 761, & do. 372-5, Contra that it is independant see 2 Bb. R 1312, The consid. shall be so construed as to arrive at the spirit and meaning of the parties Doug 665, 1 T R 645, 6 do 570, 668, 7 do 130, & do. 373, 2 New Rep 240

I remarked that if the promises are independant either or both may sue at the same time without averring performance Doug. 665, 1 Fomb 382, Cowp 56, 3 Leach 1, But English Courts of Law have of late leaned against construing promises independant 4 T R 761, & do 371, Wils 496, 1 East 619,

Mutual promises must both be binding or neither of them will be so. that is binding in point of law and generally they must be binding in point of fact exception mutual promises between an Infant and an Adult Salk 24, 1 Pow 360, Hob 88, By Com. Law fraud in the consid. of a contract by deed will not vitiate it but fraud in the execution of such a contract makes it void, reason, in the latter case there is no assent in the former there is. 2 H 506, 2 Coke 3, 7, 11 Coke 27, 2 Lev 422,

To illustrate the rule. A. sells B an unsound Horse for a sound one and B. gives his bond for the value

here the fraud is in the consid. of the bond and does not vitiate it. But if the bond were falsely read the fraud is in the bond itself, which makes it void.

But a Court of Equity will relieve against a fraud in the consid. of a bond or specialty. 2 P. W. 203, 3 Co. 290, 2 Row. 145,

And the rule was the same at law in relation to all cont. executed as it was with relation to Deeds or Specialties and that the party must pay and take his remedy for the fraud in another action.

But now the rule holds only as to deeds or specialties. Peak 2. 233, 1 Compb 39, 190-4, 4 Br. 95, 4 Johns 453, See further on this subject Title Action on the Case No. 74.

Our Courts hold that where the fraud is in the consid. of a cont. by specialty and total i.e. the consid. of no value that the instrument is void at law, 1 Root 58, 305,

Interpretation of Contracts
It is important to ascertain the intention of the parties to it. And wherever express the contract may be it can not be carried beyond that intention. 1 Bos. 173-4, Every bank is to be carried to the full extent intended if the language will admit, 1 Bos. 372, The language is to be understood according to its ordinary signification unless there are special reasons to the contrary. Why? Because so they are generally used and so they are supposed to use them. Cro. El. 346, 2 New Rep. 213, 2 Bos. 26, 1 Row. 374,

Words expressive of quantity are construed according to their meaning at the place where used. Shepherd 172 1 Bos. 376, G. thinks this rule will not hold where the contract is to be performed at another place. 2 P. W. 44, 676, 1 Bos. 487,

Where the language is ambiguous its meaning may be collected 1st from the subject matter 2^d from the effects of an opposite construction 3^d from the circumstances attending the transaction.

First. Subject matter, as in a covenant of warranty shall be construed to extend only against better title. See 425, Cro. Eliz. 212-3, 1 Row. 203, 379. 388-9, I can see from necessity, that it may have some effect

the bond is payable at the last one 1 Bow 397-8
 Berk sec. 775, 1 Ey Cas 18, 1 Bow 450.

Another exception is where the application of the rule would occasion an injury to a third person
 as if a tenant in tail leases for life without
 mentioning for whose life it shall be for the
 life of the lessor for if for the life of any other
 person it might be an injury to the issue in tail
 1 Inst 4 Ey 1 Bow 400.

Subject to these rules the language is to be con-
 strued according to its general acceptation
 1 Bow 1 Bow 400.

However when legal language is used it is to be
 generally understood according to its legal sig-
 nification 2 Roll 253, 1 Bow 402, Hob. 217.

In agreement to say what shall be proved to be due
 is construed to mean what shall be judicially so
 proved Hob 217, 1 Bow 405.

Conveyances shall be construed according to their
 general intent though it be opposed to some
 particular intent: as where land is given in trust
 to raise a portion for minor children from the rents
 and profits and it is found it cannot be done with-
 out selling it, it may be sold. And this rule is ap-
 plicable to all kinds of instruments. Bro Eliz 43, 615,
 1 Bow 403.

Where one has stipulated for the delivery of an article
 to another which is not delivered at the time, the
 value of the article when it should have been de-
 livered is the rule of damages in an action for the
 non-delivery. To this rule one exception. If the price
 of the article has risen since the time when it
 should have been delivered the rule of damages
 shall be the enhanced price. 1 Vern 217, 1 Ey Cas
 221, Stra 406, 2 Bur 1010, 2 East 211, 2 Vern 394,
 If several deeds are made at the same time
 between the same parties concerning the same thing
 all of them shall be considered as parts of the
 same contract - Instance - A mortgage with
 a separate defeasance 2 Vern 518, 1 Bow 410.

Concerning annulling discharging or waiving Convey-
 And here I would remark that a contract null-

accepted on both sides either freely, may retract his offer but when once accepted it becomes a complete contract and either may compel performance or recover damages for nonperformance 3 T.R. 653, 1 Pow 334, 2 Bbl 41, Nob 41, e.g. A meets B in the street and offers him \$20. for his watch while B is deliberating. If B withdraws his offer there is no contract but if B. before withdrawing the offer says "I will take it" and offers to perform the contract is good and binding, 2 Bbl 447, 2 Do 241, Nob 41, 2 Pow 63-4,

If upon such an offer accepted earnest is paid or a later time for performance is appointed the contract is good and if the property before the time for performance is sold to a third person who knows of the contract it is no sale. But if no part payment is made no earnest given no delivery had no time appointed for performance and the parties separate after making and accepting the offer the contract is at an end and not binding. 2 Bbl 447, 1 N Bbl 363, 2 Do 316, 1 Pow 231,

Again if A agree to sell goods to B provided he should wish to take them on the morrow morning and B in the morning should give notice that he would take them still there would be no contract for contracts must be mutual both must be bound or neither and in this case only one is bound - 3 T.R. 653, see contract Pow 261. but wrote before this case was determined. I now think this case good law though once I doubted -

But when a contract is actually complete

Before a right of action accrues on a simple contract the parties may rescind it by expressing their mutual assent to do it for then there is no commutative right to discharge Com Dig Pl. 2 Ep 13, Bro. Bl 383, 1 Pow 412, 2 Lev 144. 1 Mod 259, 12 Do 538, 12 Do 538,

But after a right of action has accrued even a simple contract cannot be discharged by mere agreement unless by deed or special contract, I say mere agreement for if there is a new agreement executed it will discharge it. for it amounts to an accord and satisfaction. 12 Mod 583, Bro Bl 384, 2 Mod 44, 259, 1 do. 259, 1 Pow 412, 416,

Exception. A Bill of exchange accepted by drawer may be discharged by another agreement. but these are governed by mercantile law. Chit B. 43-4, 4th Dig 47, Doug. 235, 247, -

But though a bare agree^{mt} will not discharge a vested right still a bare omission to claim under it will in some instances. But this is on the ground of presumed abandonment 2 Sg. Cas 207, 9 Mod 2, 3, 2 Bone Parl. Cas 116, 2 O. W. 2, Skin 409,

And an agree^{mt} if consummated and executed may be rescinded by one of the parties only where there is a provision to that effect in the contract itself 1 J R 135, Cowp 418, Doug 23, 2 East 145, 3 Esp 42, 1 New Rep 351, 7 J R 201, Mr Powell says if a contract with B for such a price as a third person shall name they cannot rescind the contract. 1 Pow 415-6, This is contrary to principle and I presume not law.

(106) A release may be either express or tacit. An express release is one by deed or instrument under seal. Tacit is one which is implied from delivering the instrument up to be canceled. 1 Pow 4, If one prevents the other from performing the party prevented is discharged. Mr Powell says the contract is canceled or destroyed. But I think the party preventing is still liable to perform his part of the agree^{mt} 6 Coke 91-2, 1 Inst 206, Bro Eliz 374, 1 Pow 265, 416, And the party prevented is in the same condition as far as regards his rights under the contract as if he had performed his part. 1 Inst 210, 1 Pow 417-40, A contract by deed or specialty cannot be annulled or discharged by parol agree^{mt} maxim - every instrument must be discharged by one of as high a nature 6 Coke 44, Bro Pam 254, Ryeb. 192, 1 Saund 291, note 2 Will 46, 376, It is said even payment of a bond or record & satisfaction is no discharge but payment of the money due on a bond discharges it. But this is merely a distinction in pleading Bro Pam. 254, Ryeb. 192, 9 Mod 144, 6 Sg. 43-4, Bro Pam 99, 650, Bro Eliz 46, When the right and obligation coalesce or meet in the same person the contract is discharged.

e.g. when the obligor in a Bond is made executor 39
by the obligee. again. When the obligor and obligee
intermarry, 4 Coke 130, Salk 300, 2 Pow 254-5, 9. Mod
62, 3 Bac 699, 1 Pow 438-9, 444,
A contract may be discharged by a statute Law
hence if before the time of performance the act to
be done is prohibited by a statute the contract
is discharged Salk 198, 4 Mod 51, 2 P.W. 218,
Also also by the act of God 10. Mod 268. 1 Bk 98. 1 Pow 446,
hence if A hires a horse to B to be returned on
such a day, if the horse dies by disease without the
fault of bailee before the time of delivery the contract
is discharged Palm 548, 1 Pow 447-8,
So also if one is bound in a parcel Bond to convey
land to another at such a time and dies before
the time the parcel is discharged but a court
of equity may compel the heir to convey 1 Bq Con 18,
The act of a third person cannot regularly vary
or discharge a contract. 1 Pow 451,
But where a contract by the terms of it is to take
effect, be varied or destroyed by the act of a third
person then his acts will affect it so far as provided
for in the contract. as if A contracts to give for a
thing what B shall say it is worth 1 Pow 415,

A contract may be annulled by a new contract of a
higher nature for the same thing. The simple
contract is said to be merged in the specialty
and so a specialty may be merged in a judgment
6 Coke 45, 3 Bac 134, 2 Bq 164, 3 Bq 251,
The true reason for this rule is that it is presumed
to be the intention of the parties.
However if A should give his bond to B for a debt
against C. by simple contract C's contract is not
merged by A's bond for that is merely a collateral
necessity. 1 Pow 423 in margin Dyer 230.
A contract of any given degree cannot be extinguished
by a new one of equal degree. As if A should
give B a note for \$100 and the next day should
give him another note for the same sum for the
same thing the first is not discharged 1 Bq 9,
Cro Eliz 517, 417, Chit B. 62, 6 Bq 517,

4th Still if given any way of satisfaction it will discharge the first debt if it can be proved that the second debt was given in satisfaction of the first. But the second note must be pleaded by way of accord & satisfaction 12 Am 136, 5 Ark 17, 20 Am 426, 5 East 232, 3 Do 251, 2 T R 26,
And where a court of a lower nation is recited in one of a higher nation merely to corroborate the former. The contract of the lower nation is not discharged or merged and the deed may be given in evidence to prove the simple contract - reason the deed was not intended to merge the simple contract - 1 Bos 19, 1 Roll 118, 6 Am Eliz 644, 1 Bos 425, 218, 225,

The End of Contracts.
Litchfield Oct^r 25th 1788
Ezra Bates



















